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*Before the*  
**FEDERAL COMMUNICATIONS COMMISSION**  
*Washington, D.C.*

FEDERAL COMMUNICATIONS COMMISSION  
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In the Matter of

Implementation of Section 309(j)  
of the Communications Act -  
Competitive Bidding

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PP Docket No. 93-253

**EX PARTE COMMENTS**  
**ON PETITIONS FOR RECONSIDERATION**

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FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF SECRETARY

## Implementation of Section 309(j) of the Communications Act - Competitive Bidding

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## EX PARTE COMMENTS ON PETITIONS FOR RECONSIDERATION

Allied Communications, L.P. ("Allied"), through counsel, hereby petitions the Federal Communications Commission ("Commission") to provide installment payments to designated entities for the upcoming auctions of licenses for Personal Communications Services (PCS) spectrum for Major Trading Areas (MTAs), which commence on December 5, 1994. While small, minority- and women-owned companies have an opportunity to bid on these spectrum licenses, that opportunity is meaningless without a provision enabling these companies to participate in a fair and competitive manner. The Commission has acknowledged the fact that companies owned by women and/or minorities have been historically disadvantaged in terms of access to capital and access to licenses to spectrum. In light of recent consolidations and mergers by telecommunications conglomerates, an installment payment plan for designated entities

bidding in Commission spectrum auctions presents a narrowly-tailored remedy, while providing a method of overcoming the hurdles designated entities face when entering this industry.<sup>1</sup>

### **ALLIED COMMUNICATIONS, LIMITED PARTNERSHIP**

Allied is a limited partnership formed to establish, construct, operationalize and manage telecommunications facilities, with a particular emphasis on wireless telecommunications systems. Allied is preparing to bid in the December 5, 1994 spectrum auction of MTA licenses. Allied has experience in earlier Commission auctions for licenses, and is a designated entity for participation in the December 5, 1994 auction of MTA licenses. Allied is comprised of three General Partners -- Allied Communications Group, Inc., International Wireless Telecommunications, Inc., and Silla Corporation -- and one Limited Partner, Jackson Holdings. Allied offers the following observations and proposals for consideration of a revision in the MTA auction rules, particularly the adoption of installment payments as a designated entity incentive. These points can be summarized as follows:

I. In light of recent consolidation by many of the major players in the telecommunications industry, it is vital that the Commission implement a measure by which designated entities, who face difficulties in obtaining financing, can compete against these concentrated companies. See Wall Street Journal, "Wireless Giants, Some Surprise Players, to Seek New Generation of Licenses," Leslie Cauley and Mary Lu Carnevale, October 31, 1994, A4 (mergers and alliances include (1) AT&T and McCaw Cellular; (2) Sprint, Telecommunications, Inc., Comcast Corporation and Cox Enterprises; (3) Bell Atlantic with Nynex,

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<sup>1</sup> Section 309(j)(3)(B) provides that in establishing eligibility criteria and bidding methodologies the FCC shall promote "economic opportunity and competition . . . by avoiding excessive concentration of licenses and by disseminating licenses among a wide variety of applicants, including small businesses, rural telephone companies, and businesses owned by members of minority groups and/or women." 47 U.S.C. § 309(j)(3)(B).

US West and Airtouch Communications; and (4) Continental Cable and Cablevision, Inc.) By doing so, the Commission can comply with Congress's intent to ensure that designated entities have "the opportunity to participate in the provision of spectrum based services by providing opportunities for designated entities to "fairly" participate as service providers and licensees." 47 U.S.C. sec. 309(j)(4)(D). Also see speech by Chairman Reed Hundt to the National Urban League (July 26, 1994).

II. Implementation of installment payment option for designated entities bidding on MTAs, which parallels the plans instituted in September for designated entities bidding on regional narrowband PCS licenses, would be the least invasive, least restrictive option the Commission could adopt. Such a plan would promote the public interest, while balancing the competitive playing field. See In re Implementation of Section 309(j) of the Communications Act - Competitive Bidding, PP Docket No. 93-253, FCC 94-240 (released September 22, 1994). It is in the public interest for the Commission to encourage a level playing field and diversification of ownership, and in light of discriminatory lending practices and other barriers to entry. In re Implementation of Section 309(j) of the Communications Act - Competitive Bidding, PP Docket No. 93-253 at paragraphs 77-78 (released May 10, 1994).

## **DISCUSSION**

Auctioning spectrum space provides the Commission with an opportunity to present both businesses and consumers with access to new technological advances in telecommunications. The auctions also provide the Commission with an opportunity to provide remedies to the dearth of women and minority participation in the telecommunications field. See In re Implementation

of Section 309(j) of the Communications Act - Competitive Bidding, PP Docket 93-253, Third Report and Order (released May 10, 1994). Companies awarded spectrum in this auction are expected to compete with existing wireless service providers, including cellular telephone and fax services, data transmission, paging, and hybrid technologies incorporating both image and voice in a manner similar to videodialtone services.

In his statement on November 1, 1994, Commission Chairman Reed Hundt reiterated the Commission's determination that "plans for the new wireless market would include opportunities for smaller businesses, including women and minorities." See Statement of Reed E. Hundt, November 1, 1994, p.5. He also acknowledged that the Commission is promoting competition and "prices and services determined by the market rather than the government." Id. To fulfill these aims, the Commission must allow minority- and woman-owned companies to have a competitive chance to win.

As of July 26, 1994, only about .5% (490 out of 98,000) of telecommunications firms, 3% (300 of 10,000) of commercial broadcast radio and television stations, and .01% (nine of 7,500) of cable operators are owned by minorities. See Hundt Speech to The Urban League, July 26, 1994. Only 11 minority firms are engaged in delivery of wireless services. See In re Implementation of Section 309(j) of the Communications Act - Competitive Bidding, PP Docket 93-253, Third Report and Order (released May 10, 1994). Over the past 50 years, the Commission contributed to the competitively disadvantaged position in which women- and minority-owned businesses find themselves, because lucrative broadcast licenses were awarded to companies which did not include designated entities. Since 1978, the Commission and Congress have encouraged minority ownership of radio and television stations. With the

issuance of a Policy Statement in that year, the Commission announced that minority ownership would be considered a "plus" when weighed with other factors at a comparative hearing for a license. See Metro Broadcasting, Inc. v. FCC, 497 U.S. 547, 557 (1990) (upholding constitutionality of minority preferences against equal protection challenge). For the Commission to ensure diversity, economic empowerment, and access by consumers to competitive services, designated entities need financial enhancements.

### **Barriers to Financing**

The Commission, with its experience in the Narrowband auctions, knows the importance of financing. In the national Narrowband auction, designated entities had no government financing, and thus there were no designated entity winners. In the regional auctions, designated entities did receive financing from the installment payment program, and designated entities thus won spectrum licenses. These results speak for themselves, and it is not too late for the Commission to institute this simple, yet important, policy change.

The Commission acknowledged that installment payment plans are viable, reasonable, and meaningful vehicles for providing designated entities with access to financing, noting that the funding problems combined with the potentially high cost of obtaining a PCS license, form a significant hurdle for designated entities. In re Implementation of Section 309(j) of the Communications Act - Competitive Bidding, Order on Reconsideration, PP Docket No. 93-253 (released September 22, 1994). In the auctions to date, a substantial capital expenditure has been needed to acquire even one Narrowband PCS license, and, as the Commission has noted, such an expenditure generally requires access to adequate financing. Installment payments are an adequate way to help address the fact that designated entities generally face barriers to

obtaining such financing. 3rd Report & Order, PP Docket No. 93-253, GEN Docket No. 90-314, ET Docket No. 92-100 (released August 17, 1994). By extending an installment payment option to licensees, the Commission can encourage designated entities to more equal competition with telecommunications conglomerates, who have significant access to sources of private financing and established revenue schemes. Id. at 44.

### **An Installment Plan is in the Public Interest**

An installment program for the auction of MTA licenses is in the public interest for a number of reasons. First, the government will make money in this program, because the designated entities will make interest payments to the federal government. Unlike bidding credits, there would be no reduction in the price the bidder will pay for a license. Where an installment plan is used, the bidder must pay the full price bid, so the license will be more competitively valued during the auction. The Commission has noted the benefits which can be derived from financing designated entities and has long supported a broad dissemination of licenses among companies who are competing against one another. In light of the recent decision of many telecommunications conglomerates to participate in the December 5th auction, it is vital to marketplace competition that designated entities have the opportunity to bid in a competitive manner against such mega-companies. See Statement of Commissioner Andrew Barrett, In re Implementation of Section 309(j) of the Communications Act - Competitive Bidding (PP Docket No. 93-253) released June 29, 1994, and 47 U.S.C. sec. 309(j)(3)(B) (noting that auction rules should ensure that rules enhance the probability that designated entities participate competitively in auction process).

Also, where competing services exist, there will be a race in rapid deployment of services for the consumer. For the PCS marketplace to grow in a robust manner, the consumer must have a variety of competitive options from which to choose. See Statement of Commissioner Andrew Barrett, June 9, 1994, p.4. If the telecommunications conglomerates are able to bid in a manner that again eliminates designated entities from fair competition in both the auction and the PCS marketplace, the consumer will suffer from a lack of meaningful choices. The absence of competition both among PCS providers and other wireless service providers will place a financial burden on the consumer, who still will not be able to choose among diverse, market-based, competing wireless services and providers.

### **Fair and Competitive Bidding**

In Astroline Communications Company v. Shurburg, 497 U.S. 547 (1990), the Supreme Court upheld the Commission policy of providing benign, race-conscious measures if they serve important governmental objectives within the power of Congress, and are substantially related to achievement of those objectives. Id. at 564-565. Implementing installment payment plans for designated entities is a benign method of serving the objectives of avoiding a bidding process which favors providers of other communications services over entities with less established revenue streams or less access to private financial capital. In re Implementation of Section 309(j) of the Communications Act - Competitive Bidding Narrowband PCS and Amendment of the Commission's rules to Establish New Narrowband Personal Communications Services (PP



Docket No. 93-253) (released August 17, 1994).<sup>2</sup> Installment payment programs do not provide an unfair advantage to designated entities. Rather, they level the playing field. Small businesses already receive benefits from the installment payment plan in the upcoming BTA auction, and are able to bid higher in auctions, thereby increasing their chances to obtain licenses. Id. at p.45. Without installment payment programs, given the high cost of obtaining a license and the presence of very large participants in the auction, the competitive bidding program would have "the effect of favoring incumbent providers of other communications services, with established revenue streams, over smaller entities." Id. This would defeat the Commission's authority to design payment schedules to prevent the auction process from favoring companies with "deep pockets" over companies that are new, smaller, or have traditionally faced barriers to access to financing. Id. at p.44. Also see H.R. Rep. No. 103-111 at 255.

Under the recently announced mergers and consolidations, a strategy of crossbidding by the conglomerates has emerged. As each applicant has announced which license(s) it intends to bid on, it is noticeable that the conglomerates are circumventing the limitations on cellular phone companies bidding in their own markets. A firm in a collusion venture is bidding on the area where its partner is prevented from bidding, and that partner is bidding where the first firm is not eligible. One example is Chris McCaw, who is bidding as ALAACR in the markets which are closed to AT&T, the corporation which has purchased his company, McCaw Cellular. Under the joint venture structure, and in light of the Commission's recent decisions on non-

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<sup>2</sup>Also see H.R. Rep. No. 103-111 at 244 (Commission has authority to develop alternative payment schedules to prevent auction process from inadvertently favoring those with "deep pockets" over new or small companies). Congress has encouraged the Commission to prevent the spectrum auction process from favoring only those companies with access to private sources of financing, where the federal government is able to provide an alternative source for loans to new and small businesses. In re Implementation of Section 309(j) of the Communications Act - Competitive Bidding at p. 38 (PP Docket No. 93 - 253) (Released May 10, 1994).

attributable interests, the smaller company, the designated entity, cannot compete. The large corporations are using financial and market power in a maneuver to prevent smaller companies from any participation in the wireless marketplace.

The installment payment program fits squarely within the public interest, as it merely presents designated entities with a parallel source of financing. This enables designated entities to bid competitively against companies with greater access to financing, thereby making the auction process itself more competitive across the board. There are no quotas or "set-asides" under an installment payment program.<sup>3</sup> Congress did not intend to limit the designated entities to competitive bidding solely on "ghetto blocks," because the Commission was directed to engage in "disseminating licenses among a wide variety of applicants" for all PCS services. 47 U.S.C. sec. 309(j)(2)(B). We assert that the Commission must not only disseminate the licenses among a variety of entities, but also must disseminate licenses in a wide variety of areas of spectrum. Therefore, the Commission should not limit the competitive bidding ability of designated entities to a few, limited blocks, unless the Commission intends to create set-aside blocks where only designated entities can bid. Designated entities should have the opportunity to compete on a level playing field in the most valuable blocks.

There is a compelling need for the immediate implementation of an installment payment program for designated entities. The consolidation of telecommunications conglomerates is an

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<sup>3</sup>In the Omnibus Budget Reconciliation Act of 1993 (OBRA), Congress asked the Commission to be diligent in disseminating licenses among minority and women owned firms. The objective of this policy of dissemination is to encourage designated entities to compete fairly in both the auction and the post-auction marketplace. See Statement of Reed Hundt (November 1, 1994) (The auctions are "certainly the greatest single economic opportunity ever made fairly available to women and minorities.") Installment payment programs are substantially related to the Commission's objectives of presenting fair economic opportunities to designated entities; this program comes under the nexus of ownership by designated entities, diversity of programming, and marketplace competition delineated by Broadcasting, Inc. v. FCC, 497 U.S. 547 (1990).

unforeseen development, and indicates an effort by these companies to deny designated entities the opportunity to compete in a meaningful manner, and to deny the consumer meaningful choices among the services that will be built. Financing is already available for BTA's. Therefore, since MTA licenses are more expansive and more costly than BTA licenses, financing is needed by companies investing in and building MTA's, as financing is already available for BTA's. There will be no disruption or delay in the scheduled auction process, because the policy can be instituted immediately, at the staff level, and fairly considered by designated entities and other bidders, as they develop their bidding strategies; the policy should be announced prior to the November 18th cutoff date for deposits in the MTA blocks.

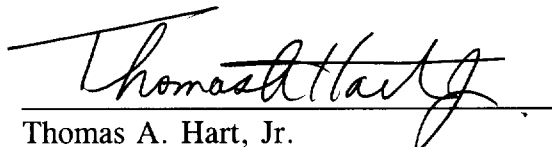
### **RECOMMENDATION**

Allied requests that the Commission immediately institute an installment payment system for the upcoming MTA auctions. The payment option will enable all designated entities to pay the full amount of their winning bid in installments (less the upfront payment, which should be paid in full, and the down payment, half to be due five days after the auction closes and the other half five days after the application is granted). Interest charges will be fixed at the time of licensing at a rate equal to the rate for ten-year U.S. Treasury obligations. Payment of interest only will be due for the first two years. Principal and interest payments will be a condition of the license grant and failure to make such payments on a timely basis will be grounds for license revocation. The general rules preventing firms that are not designated entities from receiving unjust enrichment should also be employed.

## CONCLUSION

Congress and the Commission have stated that an objective of the auctions of PCS spectrum is to facilitate the acquisition of licenses by designated entities. The Commission has made some steps in that direction through tax certificates, bidding credits, and entrepreneur blocks, as well as installment payment programs. Historical barriers against the access to credit by minorities and women, and the more recent mergers and consolidations of a number of telecommunications giants, jointly make it imperative for the Commission to institute installment payments for the December 5, 1994 auction. To disseminate licenses to a wide variety of applicants, to promote rapid deployment of new technologies in a competitive marketplace, and to support economic opportunities for diverse entities, the Commission must ensure that the bidding process is competitive, with the bidders situated on a level playing field. Designated entities can only bid competitively if the Commission provides access to financing via an installment payment program. Allied respectfully requests that the Commission modify its PCS auction rules in accordance with the recommendations set forth and discussed herein.

Respectfully submitted,



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